IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 27TH NOVEMBER 2006 / 6TH AGRAHAYANA 1928

WP(C).No. 26290 of 2006(D)

OS.308/2005 of MUNSIFF COURT, CHANGANACHERRY

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PETITIONERS:

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1. SOSAMMA @ VALSAMMA,
   MULLAMKATTIL - EBENEZER HOUSE,
   ANGADI P.O., RANNY,
   PATHANAMTHITTA.

2. M.M.THOMAS @ KUNJUMON,
   MULLAMKATTIL - EBENEZER HOUSE,
   ANGADI P.O., RANNY,
   PATHANAMTHITTA.

3. VARGHESE @ BABYCHEN,
   MULLAMKATTIL - ELUMULLIL HOUSE,
   PUTHAVELIL P.O., KANGAZHA VILLAGE,
   KOTTAYAM.

BY ADV. SRI.JACOB P.ALEX

RESPONDENT:

JOSEPH @ APPACHAN,
KAILLANIPLANCKAL HOUSE,
KANGAZHA KARA, KANGAZHA VILLAGE,
KOTTAYAM DISTRICT.

BY ADV. SRI.RAJESH THOMAS
SRI.K.P.SHAHUL HAMEED
SRI.JIJO JOSEPH
SRI.DAVID JOHN

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 27/11/2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

W.P.(C)26290/06

APPENDIX

PETITIONERS' EXHIBITS

EXT.P1: TRUE COPY OF PLAINT IN O.S.308/2005.

EXT.P2: TRUE COPY OF THE COMMISSION REPORT IN O.S.308/2005.

EXT.P3: TRUE COPY OF THE WRITTEN STATEMENT IN O.S.308/2005.

EXT.P4: TRUE COPY OF I.A.1158/06 IN O.S.308/05.

EXT.P5: TRUE COPY OF THE ORDER IN I.A.1158/06 IN O.S.308/05.

RESPONDENT'S EXHIBITS

EXT.R1(a): TRUE COPY OF THE OBJECTION DTED 11.8.06 FILED BY THE RESPONDENT TO EXT.P4 APPLICATION.

/TRUE COPY/

PA TO JUDGE.

M.SASIDHARAN NAMBIAR,J.

W.P.(C)NO. 26290 OF 2006

DATED THIS THE 27th DAY OF NOVEMBER, 2006

JUDGMENT

Petitioners are the defendants in O.S.308/05. Respondent is the plaintiff. Respondent instituted the suit seeking a decree for declaration of prescriptive easement right over petitioners' property and for injunction. A commissioner was appointed. Commissioner submitted the report. Subsequently petitioners filed Ext.P4 application with a prayer to appoint a new Commissioner. Under Ext.P5 that application was dismissed. It is challenged in this petition filed under Article 227 of Constitution of India.

2. Learned Counsel appearing for petitioners and respondent were heard.

3. The argument of learned counsel appearing for petitioners is that the facts sought to be noted by appointing a Commissioner under Ext.P4 application were not matters which were reported by

the commissioner in the earlier report and additional facts, which are necessary to disprove the case of respondent and support the case of petitioners raised in the written statement and therefore learned Munsiff should have appointed the Commissioner as sought for.

4. On going through Ext.P4 application, it is seen that the attempt of petitioners is to discard the original report without filing an application to set aside that report by appointing a new Commissioner. If the purpose of petitioners is to note additional facts, which were omitted to be noted by the Commissioner, petitioners could have filed an application to remit the report back to the Commissioner for noting the additional facts sought for by petitioners. Evidently Ext.P4 application is not for that purpose. In such circumstances, I find no necessity to interfere with Ext.P5 order. If so advised, petitioners are at liberty to file a separate application before the Court below to remit the report back to the Commissioner, to

note the additional facts and if the Court finds that additional facts sought to be noted are relevant and necessary for proper disposal of the suit, learned Munsiff may remit the report back to the Commissioner.

Petition disposed.

M.SASIDHARAN NAMBIAR,JUDGE

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